IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. 349

FIRST NATIONAL BANK OF CHICAGO, AS EXECUTOR OF THE ESTATE OF JOHN LOUIS NELSON, DECEASED,
*Petitioner,*

*vs.*

UNITED AIR LINES, INC., A CORPORATION,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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# INDEX TO PETITION AND BRIEF.



SYNOPSIS OF ARGUMENT:

I. It is implicit in the Full Faith and Credit Clause that each State will make available a forum for foreign actions, recognition of which is compelled by that provision of the Constitution. If a State bars foreign actions, it is for this Court to look behind the statute and determine whether the motive or justifica-

4. If both the Full Faith and Credit and the jurisdictional points, I and II above, are not well taken, the result will deprive the petitioner of substantial damages for the family of the decedent. This furnishes a proper motive to search for some machinery or procedure to obviate that injustice. The Second Circuit has indicated that section 1406 (a) is a remedial statute to prevent injustice. Under such circumstances it supplies machinery whereby this and other like cases can be transferred to the proper venue "in the interest of justice." ..... 32, 33

IV. The Illinois Injuries Act, enacted in 1853, has the title, "An Act requiring compensation for causing death by wrongful act, neglect or default." The first section created the cause of action, and the second section provided who was to bring it, for whose benefit recovery was had, a limit on the amount of recovery, and the time within which the action should be brought. The provisos of 1903 and of 1935 each bore the title, "An Act to amend Section 2 of 'An Act requiring compensation for causing death by wrongful act, neglect or default'." The single subject provision of Section 13 of Article IV of the Illinois Constitution of 1870 provides that no act shall embrace more than one subject, and that shall be expressed in the title. The addition of the provisos of 1903 and of 1935 brought into the enactment a subject not embraced in its title, but entirely foreign to its title. An Illinois statute requiring compensation for wrongful death can have no bearing on a foreign action for wrongful death, since the local statute can have no extra-ter-

## Table of Cases Cited.

CONSTITUTIONAL PROVISIONS AND STATUTES CITED.

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### Summary and Short Statement of the Matter Involved.

Important Federal questions are involved here:

IS NOT A STATE STATUTE CREATING AN ACTION FOR WRONGFUL DEATH, BUT WHICH DEPRIVES LOCAL COURTS OF JURISDICTION TO HEAR LIKE ACTIONS CREATED BY SISTER STATES WHERE SERVICE OF PROCESS MAY BE HAD WHERE THE ACTION AROSE, VIOLATIVE OF THE FULL FAITH AND CREDIT CLAUSE OF THE FEDERAL CONSTITUTION?

IF THE REASON FOR DENIAL OF JURISDICTION IS NOT BECAUSE OF ANTAGONISM TO SUCH ACTIONS, BUT SIMPLY TO REDUCE THE CASE LOAD OF LOCAL COURTS, IS THE POLICY DENYING LOCAL JURISDICTION SUFFICIENT TO OVERCOME THE STRONG UNIFYING PRINCIPLE EMBODIED IN THE FULL FAITH AND CREDIT CLAUSE LOOKING TOWARD MAXIMUM ENFORCEMENT IN EACH STATE OF THE OBLIGATIONS OR RIGHTS CREATED OR RECOGNIZED BY THE STATUTES OF SISTER STATES?

WHERE DENIAL OF JURISDICTION TO LOCAL COURTS TO HEAR AND DETERMINE ACTIONS CREATED BY LAWS OF SISTER STATES IS NOT BECAUSE OF ANTAGONISM TOWARDS SUCH ACTIONS, BUT RATHER TO REDUCE THE CASE LOAD OF THE LOCAL COURTS, MAY SUCH STATUTE HAVE THE EFFECT UNDER *ERIE* V. *TOMPKINS* TO DEPRIVE FEDERAL COURTS OF JURISDICTION? WOULD NOT THE EFFECT OF THE LOCAL STATUTE TO SO DEPRIVE FEDERAL JURISDICTION BE A VIOLATION OF ARTICLE III OF THE FEDERAL CONSTITUTION?

John Louis Nelson was killed in the Bryce Canyon, Utah, air crash disaster on October 24, 1947, while returning home to Chicago from Los Angeles as a passenger aboard Respondent's DC-6 airliner.[1] Petitioner, his executor, brought suit under the Utah death statute[2] against Respondent, a Delaware Corporation (but with its principal office in Chicago), in the District Court for the Northern District of Illinois,[3] for the benefit of the surviving widow and children (R. 3, 4).

The Third Defense pleaded in Respondent's Answer set forth the following proviso to Section 2 of the Illinois Injuries Act[4]:

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1. *Res ipsa loquitur* applies to actions for injuries from such a casualty. Cases collected in *Smith* v. *Penn. Central Airlines*, 76 Fed. Supp. 940.

2. Section 104-3-11 UCA 1943.

3. When suit was filed, *Stephenson* v. *Grand Trunk W. R. Co.*, 110 Fed. (2d) 401 (C. C. A. 7, 1940), held that recovery could be had on foreign actions for wrongful death in Federal Courts in Illinois. Certiorari was granted in that case (310 U. S. 623), but dismissed under Rule 35 (311 U. S. 720). *Davidson* v. *Gardner*, 172 Fed. (2d) 188 (C. C. A. 7, 1949) affirmed the *Stephenson* case. Two later cases, however, reversed the former decisions and held that the proviso to Section 2 of the Illinois Injuries Act deprived the Federal Court of jurisdiction (*Trust Co. of Chicago* v. *Pennsylvania R. Co.*, 183 Fed. 2d 640, 644; *Munch* v. *United Air Lines*, 184 Fed. 2d 630). At the time of the two latter decisions, the statute of limitations, both of Illinois and of Utah, had run in the instant case.

4. Ill. Rev. Stats. 1949, Ch. 70, pars. 1 and 2. This is a death statute enacted in 1853. Section 1 created a cause of action for wrongful death. Section 2 provided: in whose name the action should be brought; for whose benefit recovery was had; a limit on the amount of recovery; and the time within

"Provided, further, that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place."

It was alleged that Respondent was licensed to do business and had agents on whom process could be served in Utah where the injury and death occurred; and therefore the District Court in Illinois was barred from entertaining this suit (R. 10). Petitioner moved to strike this defense, raising the constitutional questions presented here. In the alternative, a motion was made to transfer the case to the District Court in Utah under Section 1406 (a) of the Judicial Code (R. 18, 19-22).

The District Court overruled the amended motion to strike the Third Defense, finding:

(a) The proviso to Section 2 of the Injuries Act does not violate Section 13 of Article IV of the Illinois Constitution;

(b) The Illinois statute deprives a Federal District Court in Illinois of jurisdiction to entertain a suit for a wrongful death occurring in Utah;

(c) The deprivation of jurisdiction thus caused by the Illinois statute is not in violation of Article III of the Federal Constitution;

(d) Said statute does not violate the Full Faith and Credit clause of the Federal Constitution.

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which suits must be commenced. The following proviso was added to Section 2 in 1903 (Ill. Laws 1903, p. 217): "Provided, further, that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State." This proviso was amended to its present form, quoted in the text, in 1935 (Ill. Laws 1935, p. 916). Of course, the proviso, as it was phrased from 1903 until 1935, was void under the authority of *Hughes* v. *Fetter* (June 4, 1951), 95 L. ed. 822.

The alternative motion to transfer the suit to Utah was likewise denied, the Court finding that venue was properly laid, and since it was, Section 1406 (a) conferred no power to transfer the case; but, in any event, since there was no jurisdiction to entertain the suit, there was nothing before the Court to transfer.

Judgment was thereupon entered for the defendant (R. 22-24).

Petition was made to this Court, but denied, that certiorari issue before judgment in the Court of Appeals (Docket 558, Oct. Term, 1950; R. 43).

Prior to argument and decision of the Court of Appeals, opinion was rendered by this Court in *Hughes* v. *Fetter*, 341 U. S. ....., 95 L. ed. 822 (June 4, 1951).

In spite of that opinion, the Court of Appeals, on July 5, 1951, by a *per curiam* decision held that *Hughes* v. *Fetter* was not decisive of the question here; that the Illinois Statute was properly justified under the Full Faith and Credit clause because it reduced the case load of Illinois courts, and thereby tended to promote the prompt and orderly administration of justice, a matter of vital and legitimate concern to Illinois; that the former holdings of the Court of Appeals for the Seventh Circuit had established that the Illinois statute was a bar to Federal jurisdiction to hear like actions in Illinois; that the Illinois statute was not violative of the single subject provision of Section 13 of Article IV of the Illinois Constitution; and that since the District Court had no jurisdiction of the subject matter of this suit, it had no power to transfer the case under Section 1406 (a) of the Judicial Code.

It is this decision of which review is requested here.

## Basis on Which It Is Contended That This Court Has Jurisdiction.

This Court's jurisdiction is invoked under 28 U. S. C. A., Sec. 1254.

## The Opinion Below.

At the time of the preparation of this Petition and Brief in Support, the opinion of the Court of Appeals below had not been published. It was handed down July 5, 1951. Said opinion is printed in full in the Record (R. 45-50), and, for convenience, made an Appendix to this Petition and Brief. No petition for rehearing was filed.

## The Questions Presented.

### Full Faith and Credit.

Does the fact that Illinois has created and permits recourse to its courts upon actions for wrongful death arising within its boundaries, negate any permissible Illinois policy, within the narrow limits imposed by the Full Faith and Credit Clause, to justify denial of jurisdiction to like actions created by laws of sister States?

Is not the decision of this Court in *Hughes v. Fetter*, 341 U. S. ....., 95 L. ed. 822, decisive of the question that Illinois' policy against foreign actions for wrongful death must yield to the strong unifying force of the Full Faith and Credit Clause?

### Jurisdiction of the District Court.

If a local statute barring jurisdiction of local courts to hear actions for wrongful death arising by laws of sister States is prompted, not by antagonism against wrongful

death suits in general, but rather to reduce the case load of local courts, can such statute have the effect to bar jurisdiction of Federal Courts, sitting locally? Would not a like limitation on Federal Courts be a matter for Congress, and not a State, to determine?

Would not a construction of *Erie* v. *Tompkins* which divests jurisdiction of a Federal Court by reason of such a local statute be in violation of Article III of the Federal Constitution?

Is the denial of jurisdiction to local courts imposed by a local law barring jurisdiction a matter of remedy and of practice and procedure, to which the doctrine of *Erie* v. *Tompkins* has no application, or does the statute express a local policy which if paramount to the Full Faith and Credit. Clause of the Federal Constitution, forms a substantive bar to the forbidden action, to which the doctrine of *Erie* v. *Tompkins* is applicable?

In applying the jurisdictional bar of a local statute to a foreign cause of action under the principle of *Erie* v. *Tompkins* in a diversity case, does a Federal Court adopt local policy as a substantive bar or defense to the cause of action, or does the local statute divest the Federal Court of jurisdiction—the *power* to hear and determine the action?

**On the Alternative Motion to Transfer.**

If under *Erie* v. *Tompkins* a State statute barring jurisdiction of its courts to certain foreign actions likewise bars jurisdiction of the Federal District Courts within that State, may such Federal Court transfer the case to a Federal Court sitting where the cause of action arose under Section 1406 (a) of the Judicial Code?

## Reasons Relied Upon for the Allowance of the Writ.

### Full Faith and Credit.

The Court of Appeals below has decided the Full Faith and Credit question raised here in direct conflict to this Court's decision in *Hughes* v. *Fetter*, 341 U. S. ....., 95 L. ed. 822, June 4, 1951.

### Jurisdiction of the District Court.

The Court of Appeals, in sustaining the validity of the Illinois Statute under the Full Faith and Credit Clause, holds that Illinois has a legitimate interest in regulating and reducing the case load of Illinois' courts, a matter of vital and legitimate concern to that State. The effect of such decision is to say that a State may regulate and prescribe the remedies afforded by a Federal Court, sitting locally. This is contrary to a great body of law decided by this Court that any limitation, impairment, abridgement, destruction or enlargement of Federal jurisdiction on the part of the States is a violation of Article III of the Federal Constitution. The decision below, therefore, is at complete odds with applicable decisions of this Court.

This Court in *Angel* v. *Bullington*, 330 U. S. 183, and *Woods* v. *Interstate Realty Co.*, 337 U. S. 535, has held that local statutes barring jurisdiction of local Courts are effective as a bar to actions in diversity cases in Federal Courts sitting locally. The Court below has held that the Illinois statute barring jurisdiction likewise bars jurisdiction of a Federal Court sitting in Illinois—divests the power to hear and determine the controversy. The question arises as to whether, under the doctrine of *Erie* v. *Tompkins* the local statute, which bars jurisdiction of local courts, may likewise divest jurisdiction of the Federal

Court, or whether, rather, the local statute is expressive of a policy antagonistic or abhorrent to a cause of action created elsewhere, and thus provides a defense to the foreign action, but not a divestiture of jurisdiction. Thus there is raised here an important question of Federal Law which has not been, but should be, settled by this Court.

The jurisdictional question here was decided by the Seventh Circuit in accordance with Petitioner's contention in *Stephenson* v. *Grand Trunk W. R. Co.*, 110 F. 2d 401 (1940). Certiorari was granted in that case (310 U. S. 623), but dismissed under Rule 35 (311 U. S. 720). A like decision was reached by the same Court in *Davidson* v. *Gardner*, 172 F. 2d 188 (1949). The decision below in the case at bar, as well as those of the same Court in *Trust Co. of Chicago* v. *Pennsylvania R. Co.*, 183 F. 2d 630, and *Munch* v. *United Air Lines*, 184 F. 2d 630, overrules the earlier decisions. The fact that certiorari was granted by this Court on the same question, and that the Seventh Circuit has rendered several conflicting opinions upon it, indicate that here is involved an important question of Federal Law which has not been, but should be, decided by this Court.

**On the Alternative Motion to Transfer Under Section 1406 (a).**

If a local statute may deprive a Federal Court of jurisdiction, or provide a defense that does not exist elsewhere, then it is possible that great injustice may be done (as here), unless there is some means of transferring the cause to a Federal Court where there is no local statute having such effect. It was contended below, and decided to the contrary by the Court of Appeals, that Section 1406 (a) does supply the machinery for such a transfer. This presents an important question of Federal Law which has not been, but should be, settled by this Court.

## Prayer for Certiorari.

Wherefore Petitioner, for the reasons outlined above, as amplified by the Brief in support of this petition which follows, prays that this Court grant its writ of *certiorari* to review the proceedings below.

FIRST NATIONAL BANK OF CHICAGO,
as executor of the Estate of John
Louis Nelson, deceased,
*Petitioner.*

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## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

### Foreword.

The first two points made and argued in this Brief are (1) that the Illinois statute is void as being counter to the Full Faith and Credit Clause, § 1 of Article IV of the Constitution, and (2) that to permit the Illinois statute to have the effect of barring Federal jurisdiction is a violation of Article III of the Constitution.

In one respect, these two points are intermeshed inextricably,—namely, that it follows as matter of absolute logic, with no possible middle or third ground, that the Illinois statute is *either* void as counter to the Full Faith and Credit Clause *or* it cannot have the effect of barring jurisdiction of the Federal Court below, because to do so would be a clear violation of Article III.

The decision below was rendered after the decision of this Court in *Hughes* v. *Fetter*, 341 U. S. ....., 95 L. ed. 822 (June 4, 1951), and attempts to distinguish that decision on the ground, that, while the Wisconsin bar to foreign death actions is absolute, the Illinois bar is only against those where process can be served where the action arose. It is manifest that Illinois has no antagonism against wrongful death actions, as shown not only by its own creation and recognition of such actions arising locally, but also by its recognition of foreign death actions where process cannot be served where they arise. This inescapably confines the justification for such bar to local jurisdiction to an attempt to regulate and reduce the case load on Illinois courts, as the Court of Appeals held below. *If* this is a proper justification for such a statute under the Full Faith and Credit Clause, *then the local*

*statute cannot bar Federal jurisdiction* because such effect would permit State action to limit, abridge or destroy Federal jurisdiction in violation of Article III. Reduction of the case load of Federal courts is a matter for Congress, and not the States, to determine.

So, we say, one or the other of the first two points made and argued *post* must of necessity be determinative here. We by no means intend by what we have said above to waive the other points raised by this brief.

## I.

### The Proviso to Section 2 of the Illinois Injuries Act Is Counter to the Full Faith and Credit Clause, Section 1, Article IV of the Constitution of the United States.

The Utah statute[1] here sued upon is set forth *verbatim* in an Appendix. It is modeled after Lord Campbell's Act.[2]

The Illinois wrongful death statute was enacted in 1853. It, too, is modeled after Lord Campbell's Act. Section 1 created a cause of action for wrongful death. Section 2 provided: in whose name the action should be brought; for whose benefit recovery was had; a limit on the amount of recovery; and the time in which suits must be commenced (Ill. Ann. Stats., Ch. 70, pars. 1 and 2, and historical note). The following proviso was added to section 2 in 1903 (Ill. Laws 1903, p. 217): "Provided, further, that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State."

Prior to the 1903 proviso, Illinois' courts entertained actions for wrongful death created by foreign statutes. *C. & E. I. R. R. Co.* v. *Rouse*, 178 Ill. 132, 139. Following

1. Section 104-3-11 U. C. A. 1943.
2. 9 and 10 Vict. ch. 93.

enactment of the 1903 proviso, Illinois courts held that they were divested of jurisdiction to hear and determine actions for wrongful death created by statutes of sister States (*Dougherty* v. *American McKenna Co.*, 255 Ill. 369, 372; *Walton* v. *Pryor*, 276 Ill. 563, 569[3]; *Wall* v. *Chesapeake & Ohio Ry. Co.*, 290 Ill. 227, 233), and that the 1903 proviso did not violate the Full Faith and Credit Clause. *Dougherty* v. *American McKenna Co.*, 255 Ill. 369, 371, 372.[4]

It is now perfectly clear that the 1903 proviso did violate the Full Faith and Credit Clause of the Federal Constitution. *Hughes* v. *Fetter*, 341 U. S. ....., 95 L. ed. 822 (June 4, 1951).

In 1935 the proviso to section 2 of the Illinois Injuries Act was amended to read as follows:

> "Provided, further, that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place." (Ill. Laws 1935, p. 916.)

The Court of Appeals below has held that the 1935 proviso, quoted above, does not violate the Full Faith and Credit Clause, because the bar of the Wisconsin statute in *Hughes* v. *Fetter* was an *absolute bar*, whereas the bar of the Illinois proviso is only *qualified, i. e.*, to cases where process may be served in the State where the injury and death occurred.[5]

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3. Compare *McKnett* v. *St. Louis & S. F. R. Co.*, 292 U. S. 230, 233. It would appear that the Illinois statute is void as denying access to Federal Employee's Liability death cases.

4. This case, as did the Wisconsin court in *Hughes* v. *Fetter*, relied on *Chambers* v. *Baltimore & O. R. Co.*, 207 U. S. 142. Such reliance was misplaced. *Hughes* v. *Fetter*, 341 U. S. ....., n. 6.

5. According to the literal wording of the proviso, it would appear that the bar to maintenance of a foreign death action is

Thus, there is posed the narrow question as to whether Illinois can bar access to its courts on actions for wrongful death created by laws of sister States where process may be served there, when (1) Illinois has created and permits access to her courts on like actions arising in Illinois, and (2) when access to foreign wrongful death actions is permitted in Illinois where service of process on the defendant cannot be had where the cause of action arose. *Hughes* v. *Fetter*, 341 U. S. ....., has effectively disposed of the question where the bar to foreign actions is absolute and where like actions are created and permitted access to courts locally.

Does the fact that the foreign death action can be entertained and reduced to judgment elsewhere justify the Illinois bar, in the light of the Full Faith and Credit Clause, which altered the status of the several States as independent foreign sovereignties each free to ignore rights and obligations created under the laws or established by the judicial proceedings of the others, and required maximum enforcement in each State of the obligations or rights created or recognized by the statutes of sister States?

It has been held many times that a State cannot escape its Constitutional obligation to enforce the rights and duties validly created under the laws of other States by the simple device of removing jurisdiction from courts otherwise competent. *Hughes* v. *Fetter*, 341 U. S. ....., n.

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interposed where (1) a cause of action for such death exists under the laws of the foreign State, and (2) where service of process may be had upon the defendant in such foreign State; and that if no action was created by the laws of the State where the death was caused, an action would lie in Illinois. Since an action for wrongful death does not lie at common law, and the Illinois wrongful death statute cannot have extra-territorial effect, an action could not be brought in Illinois absent existence of such an action where the injury occurred. The bar is interposed where process may be served upon the defendant where the injury and death occurred, assuming such an action exists there.

6; *Broderick* v. *Rosner*, 294 U. S. 629, 642-643; *Converse* v. *Hamilton*, 224 U. S. 243, 260, 261; *Kenney* v. *Supreme Lodge*, 252 U. S. 411, 415; *Angel* v. *Bullington*, 330 U. S. 183, 188. Likewise, it often has been held that the power of a State to determine limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is subject to the restrictions imposed by the Federal Constitution. *McKnett* v. *St. Louis & S. F. R. Co.*, 292 U. S. 230, 233; *Broderick* v. *Rosner*, 294 U. S. 629, 642; *Angel* v. *Bullington*, 330 U. S. 183, 188. The area in which a State may cut down rights otherwise guaranteed by the Full Faith and Credit Clause is narrow and confined. *Broderick* v. *Rosner*, 294 U. S. 629, 642, 643; *Angel* v. *Bullington*, 330 U. S. 183, 188.

The *raison d'etre* for the narrow and confined area in which a State may bar the doors of its courts to foreign actions was succinctly stated in *Pink* v. *A.A.A. Highway Express*, 314 U. S. 201, 210:

> "But the very nature of the Federal Union of States, to each of which is reserved the sovereign right to make its own laws, precludes resort to the Constitution as the means for compelling one State wholly to subordinate its own laws and policy concerning its peculiarly domestic affairs to the laws and policy of others."

To like effect are *Hughes* v. *Fetter*, 341 U. S. ____, n. 7; *Alaska Packers Ass'n.* v. *Industrial Comm'n.*, 294 U. S. 532, 547; *Pacific Ins. Co.* v. *Commission*, 306 U. S. 493, 502.

From these cases it is clear that it is only in the regulation of peculiarly domestic affairs of a State that the policy expressed in such regulation can bar enforcement of actions created elsewhere. If the foreign action is so at odds with the local policy so expressed that recognition of the foreign action would infringe or impair the regula-

tion of domestic affairs, then the Full Faith and Credit Clause does not compel local recognition of the foreign action.

In each instance it is for this Court to decide between the national policy and the local one. *Hughes* v. *Fetter*, 341 U. S. ____, n. 7; *Pink* v. *A.A.A. Highway Express*, 314 U. S. 201, 210; *Alaska Packers Ass'n.* v. *Commission*, 294 U. S. 532, 547.

We submit that this Court must look behind the statute creating the local bar, and determine the motive or justification for it. This Court so indicated when in *Hughes* v. *Fetter* it held that Wisconsin "has no real feeling of antagonism against wrongful death suits in general", but to the contrary provides a regular forum for cases of that nature arising locally.

It is implicit in the Full Faith and Credit Clause that each State will make available a forum for foreign actions, recognition of which is compelled, at least if such a forum exists for like actions arising locally. (We take it that any State may set up a judicial system which it deems best suited to serve its own needs; and if such system does not provide a forum for an unusual foreign action, it would not be compelled to furnish one.) Illinois does provide such a forum (Sec. 12, Article VI, Constitution of 1870).

What, then, is the justification or motive for the Illinois bar to foreign death actions where service of process on the defendant may be had where the action arose? Illinois has no feeling of antagonism against wrongful death actions, as is evidenced by the fact that she has created such actions locally, and permits access to her courts for enforcement of them. The 1935 proviso likewise permits access locally to foreign death actions where service of process cannot be had where the action arose. In short, Illinois says if it is possible to sue somewhere else, that

must be done; otherwise Illinois will permit suit to be instituted here. So we search in vain for a motive or justification for the bar to *certain* foreign death actions which would infringe or impair local sovereignty; the only possible answer is that Illinois does not want her courts burdened with foreign death actions if they can be entertained where they arose, regardless of the residence of the deceased, or of his personal representative. This is the justification found by the Court of Appeals below where it said that the statute tended to regulate and reduce the case load of the Illinois courts.

Is such justification legitimate in the light of the Full Faith and Credit Clause? We submit that it is not. The basis for the bar is not because of antagonism to wrongful death actions, not because the cause of action is abhorrent to Illinois' morals, or conflicting in any way with her governmental interests, but a simple denial of jurisdiction of her courts to actions created elsewhere, so as to relieve the burden on those courts. If Illinois can bar her courts to foreign actions for wrongful death, simply because she does not want her courts burdened by actions arising elsewhere, why then, cannot she bar actions on judgments entered elsewhere, on notes executed in other States, on insurance policies executed in other States, or on any of the myriad of commercial or tort actions that are daily encountered in our local courts? Since Illinois has not excluded these latter types of actions, the denial of access to her courts to foreign actions for wrongful death would be a clear violation of the privileges and immunities and equal protection clauses of the Fourteenth Amendment.

The Court of Appeals indicates that the Illinois statute is "based on considerations not unlike those responsible for the application of the doctrine of *forum non conveniens*. That doctrine can have no application here, as pointed out in *Hughes* v. *Fetter*, 341 U. S. ..... The decedent was a

resident of Illinois, the executor of his estate is a resident of Illinois and was appointed by an Illinois Court, and while respondent is a Delaware Corporation, it has its principal place of business in Chicago. That doctrine applies to non-resident plaintiffs. *Missouri* v. *Mayfield*, 340 U. S. ....., 95 L. ed. 6 (Nov. 6, 1950).

We submit that the proviso to the Illinois statute is violative of the Full Faith and Credit Clause of the Federal Constitution; and that a State cannot escape the obligation to provide a forum for actions arising under foreign public acts, when it makes available as Illinois does (Sec. 12, Article VI, Constitution of 1870), a forum to try like cases arising locally.

But, *if* Illinois may properly bar access to its courts to foreign actions for wrongful death, because it does not want its courts burdened, then we submit that it is for Congress to legislate to relieve any like burden of litigation in the Federal Courts.

## II.

### The Proviso to Section 2 of the Illinois Injuries Act Cannot Deprive the Federal Court of Jurisdiction Under the Principle of Erie v. Tompkins.

#### A. Such Construction Would Violate Article III of the Constitution of the United States.

1. The Court of Appeals below held that the Illinois statute divested the Federal Court of jurisdiction to hear and determine the Utah action for wrongful death. "* * * the provisions of the Illinois statute were binding on the Federal courts in Illinois, and constituted a bar to the maintenance of an action for damages for wrongful death * * *" (Opinion below, R. 46). "Unfortunately here the District Court had no jurisdiction of the subject matter, hence it

had no power to transfer the case to another court" (Opinion below, R. 50). The holding below was not that the Illinois statute provided a *defense in bar* to the action, as in the illustration in II B, *post*, but that *power to entertain* the action was taken from the District Court by reason of the Illinois statute.

The uniform and unbroken holdings of this Court since adoption of the Federal Constitution have been to the effect that no State action can in any way limit, abridge or destroy Federal jurisdiction conferred by Congress under the grant of power contained in Article III.

The rule was thus stated in *Harrison* v. *St. Louis, etc., Ry. Co.*, 232 U. S. 318, 328, Chief Justice White speaking for the Court:

> "It may not be doubted that the judicial power of the United States as created by the Constitution and provided for by Congress pursuant to its constitutional authority, is a power wholly independent of state action and which therefore the several states may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit or render inefficacious. This doctrine is so elementary as to require no citation of authority to sustain it. Indeed, it stands out so plainly as one of the essential and fundamental conceptions upon which our constitutional system rests, and the lines which define it are so broad and so obvious, that, unlike some of the other powers delegated by the Constitution, where the lines of distinction are less clearly defined, the attempts to transgress or forget them have been so infrequent as to call for few occasions for their statement and application."

Other cases[6] so holding, beginning with the decision of

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6. From these many cases expressing this principle we have not cited the following, which, while stating the rule, would now be governed by the doctrine of *Erie* v. *Tompkins*. *Wilson* v. *Tarpley*, 59 U. S. 517; *Kearey* v. *Farmers & M. Bk.*, 41 U. S. 88, 16 Pet.; *Suydam* v. *Broadnax*, 39 U. S. 55, 14 Pet. 67; *Beers* v. *Houghton*, 34 U. S. 215, 9 Pet. 329; *Ex Parte Schollenberger*, 96

Mr. Justice Marshall in *U. S.* v. *Peters*, 9 U. S. 115, 136, follow:

*U. S.* v. *Peters*, 9 U. S. 115, 136; 5 Cranch 65, 77 (Marshall, J.); *The Orleans*, 36 U. S. 138, 144; 11 Pet. 175, 184; *Gordon* v. *Longest*, 41 U. S. 63, 67, 68; 16 Pet. 97, 103, 104; *Union Bk.* v. *Jolly's Admrs.*, 59 U. S. 503, 507 (18 How.); *Hyde* v. *Stone*, 61 U. S. 170, 175 (20 How.); *Cowles* v. *Mercer County*, 74 U. S. 118 (7 Wall.); *Payne* v. *Hook*, 74 U. S. 425, 430 (7 Wall.); *The Belfast*, 74 U. S. 624; *Railway Co.* v. *Whitton*, 80 U. S. 270, 285-287 (13 Wall.); *Insurance Co.* v. *Dunn*, 86 U. S. 214, 223, 224, 226; *Insurance Co.* v. *Morse*, 87 U. S. 445, 453, 454, 458 (20 Wall.); *Hess* v. *Reynolds*, 113 U. S. 73, 77; *Barron* v. *Burnside*, 121 U. S. 186, 198, 200; *Lincoln County* v. *Luming*, 133 U. S. 529, 531; *Southern Pac. Co.* v. *Denton*, 146 U. S. 202, 207; *Chicot County* v. *Sherwood*, 148 U. S. 529, 533, 534; *Barrow Steamship Co.* v. *Kane*, 170 U. S. 100, 112; *Mississippi Mills* v. *Cohn*, 150 U. S. 202, 204, 205; *Western Union* v. *Kansas*, 216 U. S. 1, 35, 36; *Herndon* v. *Chicago Rock Island & Pacific Ry. Co.*, 218 U. S. 135, 158; *Harrison* v. *St. Louis*, 232 U. S. 318, 328; *Wisconsin* v. *Philadelphia & Reading Coal Co.*, 241 U. S. 329, 333; *Terral* v. *Burke Const. Co.*, 257 U. S. 529, 532; *Mason* v. *United States*, 260 U. S. 545, 557; *Pusey & Jones* v. *Hanssen*, 261 U. S. 491, 497, 498; *Matthews* v. *Rogers*, 284 U. S. 521, 529; *Stratton* v. *St. L S W Ry. Co.*, 284 U. S. 530, 533; *Penn. Co.* v. *Pennsylvania*, 294 U. S. 189, 197; *Kelleam* v. *Md. Cas. Co.*, 312 U. S. 377, 381, 382; *Burford* v. *Sun Oil Co.*, 319 U. S. 315, 317, note 3, and see 130 Fed. 2nd 10, 17, approved 319 U. S. 317; *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 103-106; *Holmberg* v. *Armbrecht*, 327 U. S. 392, 394.

The basis for the rule is fundamental.

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U. S. 369, 377; *Smith* v. *Railroad Co.*, 99 U. S. 398, 401; *Ex Parte McNiel*, 80 U. S. 236, 243; *Reynolds* v. *Crawfordsville Bank*, 112 U. S. 405, 410; *Herron* v. *Southern Pacific*, 283 U. S. 91.

Section 1 of Article III provides:

> "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish * * *."

Section 2 of Article III provides, in part:

> "The Judicial power shall extend to all cases in Law and Equity, arising under this Constitution, the Laws of the United States, and treaties made, or which shall be made under their authority; * * *. Controversies * * * between citizens of different States * * *."

Pursuant to the authority conferred by Article III, Congress has created District Courts, and conferred upon them judicial power as follows:

> "(a) The District Courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000.00 exclusive of interest and costs and is between:
>
> 1. Citizens of different States.
>
> * * *" (28 U.S.C.A. Sec. 1332).

This Court speaking through Justice Story in *Martin* v. *Hunter*, 14 U. S. 141, 154, 155, held that in those cases enumerated in Section 2 where the phrase "all cases" was used (such as those arising under the Constitution, Federal Laws, treaties, and admiralty), Federal jurisdiction was exclusive; but in respect to the other class where the word "all" was omitted, such as diversity cases, Congress might qualify the jurisdiction of Federal Courts as public policy dictated. It was there declared (p. 156):

> "But, even admitting that the language of the Constitution is not mandatory, and that Congress may constitutionally omit to vest the jurisdictional power in Courts of the United States, it cannot be denied, that when it is vested, it may be exercised to the utmost constitutional extent."

Thus, there can be no doubt that Congress was granted

the right to create District courts, and to confer on them judicial power to hear and determine "Controversies • • • between citizens of different States." Congress, having exercised its right to create District courts, and having conferred on them power to hear civil actions between citizens of different States, such power may be exercised to the utmost constitutional extent.

Obviously, to permit a State to limit or impair such power, would be a clear violation of Article III.

The Court of Appeals below, relying upon its two earlier decisions in *Trust Company of Chicago* v. *Pennsylvania R. Co.*, 183 F. 2d 640[7], and *Munch* v. *United Air Lines*, 184 F. 2d 630, has held (R. 46) that the proviso to Section 2 of the Illinois Injuries Act constitutes "a bar to the maintenance of an action (in the Federal Court) for damages for wrongful death in an action where, as here, a right of action for such death exists under the laws of the state where the death occurred." (See also R. 50.)

The two cases cited and relied upon have construed *Erie* v. *Tompkins*, 304 U. S. 64, so as to cause the Illinois statute to divest the Federal Court of jurisdiction. By such holdings they permit State action to destroy and render inefficacious judicial power of the United States as granted by the Constitution and provided for by Congress pursuant to its constitutional authority.

The decision below is clearly a violation of Article III of the Constitution of the United States in permitting State action to impair and destroy Federal jurisdiction.

Our contention here goes to the holding below that jurisdiction of the Federal Court is divested because of the Illinois statute (R. 46, 50). If the basis of decision below

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7. This case reversed two earlier cases, thought to express the law when this suit was filed and while it was pending, *Stephenson* v. *Grand Trunk W. R. Co.*, 110 F. 2d 401 (C. C. A. 7, 1940) and *Davidson* v. *Gardner*, 172 F. 2d 188 (C. C. A. 7, 1949).

had been that the Illinois statute expressed a policy making death actions noxious to Illinois' interest, that may well have provided a *defense* to the action in the District Court (see Point IIB, *post*), but it could not impair jurisdiction without violating Article III.

2. Another fundamental reason why *Erie* v. *Tompkins*, 304 U. S. 64, cannot permit the statute in question to divest the jurisdiction of the Federal District Court has been partially touched upon. As stated, Section 2 of Article III provides:

> "The judicial power shall extend to all cases in Law and Equity, *arising under this Constitution, the Laws of the United States*, and treaties made * * *." (Italics ours.)

Jurisdiction of a Federal Court in diversity cases springs from the judicial power of the United States as granted by Article III and as conferred by Congress pursuant to its constitutional authority.

Therefore if the question of jurisdiction of a Federal Court arises, as here, it would seem that the determination of that question would involve Article III of the Constitution, and "Laws of the United States" conferring jurisdiction on Federal Courts in diversity cases; and that this would be a Federal question within the first clause of Section 2 of Article III wherein Federal judicial power extends to *all cases* arising under the Constitution and the laws of the United States; and makes it one whose ultimate disposition may be made only by Federal Courts. This is an area in which *Erie* v. *Tompkins* can have no application. *Urie* v. *Thompson*, 337 U. S. 160, 174; *Holmberg* v. *Armbrecht*, 327 U. S. 392, 394. Every Federal question, "necessarily including that of its own jurisdiction, must be decided in the Federal Court." *Insurance Co.* v. *Morse*, 87 U. S. 445, 454; *Insurance Co.* v. *Dunn*, 86 U. S. 214, 223; *Gordon* v. *Longest*, 16 Pet. 97, 103, 104.

To permit the principle of *Erie* v. *Tompkins* to govern determination of Federal jurisdiction, itself a Federal question arising under the Constitution and Acts of Congress, is violative of Article III of the Constitution of the United States.

**B. Angel v. Bullington, 330 U. S. 183, and Woods v. Interstate Realty Co., 337 U. S. 535, Do Not Justify Any Such Conclusion.**

The holdings in *Trust Company of Chicago* v. *Pennsylvania R. Co.*, 183 F. 2nd 640, 644, and *Munch* v. *United Air Lines*, 184 F. 2nd 630, on which the Court below relied on the question of jurisdiction, were thought by that Court to be compelled by this Court's decisions applying the principle of *Erie* v. *Tompkins* in *Angel* v. *Bullington*, 330 U. S. 183, 191, 192, and *Woods* v. *Interstate Realty Co.*, 337 U. S. 535, 537, 538.

1. We have argued above that *Erie* v. *Tompkins*, 304 U. S. 64, can have no application to the determination of Federal jurisdiction, since that is a Federal question.

But even if the principle of that case were pertinent here, its proper application would not justify the conclusion of the Court below.[8]

The Illinois Statute was enacted to "regulate and reduce the case load of the Illinois Courts" (R. 48). In so doing it deals with a matter of remedy,—of practice and procedure, and not of substantive rights to which *Erie* v. *Tompkins* has application.

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8. Unfortunately that Court had already disposed of the jurisdictional point here (R. 46) when it, in deciding the Full Faith and Credit question, held that the Illinois statute was enacted "to regulate and reduce the case load of the Illinois courts" (R. 48). If it had applied that reasoning to the jurisdictional point, it would have been obvious that similar regulation as to Federal Courts is for Congress, and not for a State, to accomplish.

In *Bradford Electric Co.* v. *Clapper*, 286 U. S. 145, 160, this Court, speaking through Mr. Justice Brandeis, held:

> "A state may, on occasion, decline to enforce a foreign cause of action. *In doing so, it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere.*" (Italics ours.)

In *Mason* v. *United States*, 260 U. S. 545, 558, it was stated:

> "But these decisions relate to the practice, *the impairing of jurisdiction*, rather than to the determination of the rights of parties after jurisdiction has been acquired." (Italics ours.)

And in *Kelleam* v. *Maryland Casualty Company*, 312 U. S. 377, 382, it was held (and this subsequent to *Erie* v. *Tompkins*):

> "* * * a remedial right to proceed in a federal court sitting in equity cannot be enlarged by a state statute."

In *Fauntleroy* v. *Lum*, 210 U. S. 230, 234, 235, Mr. Justice Holmes spoke for the Court, and said:

> "No doubt it sometimes may be difficult to decide whether certain words in a statute are directed to *jurisdiction* or to *merits*, but the distinction between the two is plain. One goes to the *power*, the other only to the *duty*, of the court. Under the common law it is the *duty* of a court of general jurisdiction not to enter a judgment upon a parol promise made without consideration; but it has the *power* to do it * * *". (Italics ours.)

The Illinois courts, in construing the instant statute, confirm the viewpoint that denial of jurisdiction to Illinois courts is simply a matter of remedy, and not of substance. In *Walton* v. *Pryor*, 276 Ill. 563, 569, it is held:

> "There is a clear distinction, however, between creating a cause of action and providing for its enforce-

ment, which must be in a court having jurisdiction to hear whether the cause of action has arisen. The legal right comes into existence by the enactment of the law, but the remedy is provided by the establishment of courts and bestowing upon them jurisdiction."

If there is impairment of *power* to hear the controversy, as distinguished from the *duty* as to how it should be decided, the former is a matter for Congress to determine insofar as Federal Courts are concerned, and not the States. The *duty* as to how to decide the controversy comes within the doctrine of *Erie* v. *Tompkins*.

This Court has often held that to remedy and practice and procedure, as distinguished from matters of substance affecting the result of the controversy, *Erie* v. *Tompkins* does not apply. *Cohen* v. *Beneficial Loan Co.*, 337 U. S. 541, 555; *Ragan* v. *Merchants Transfer Co.*, 337 U. S. 530, 533.

2. Having in mind the constitutional foundation[9] on which jurisdiction in diversity cases rests as set forth in Point II A above, the meaning of this Court's decision in *Angel* v. *Bullington* emerges with startling clarity. That decision does not permit a State statute to impinge upon the constitutional jurisdiction of the Federal Court. *What it does is adopt State policy, expressed by the statute, as a defense or substantive bar to a cause of action created elsewhere which is counter to that expressed policy.* Such defense is imposed as a denial of comity, because the foreign action is opposed to local concepts of morality, or in conflict with local governmental interests. A State (and likewise a Federal Court, in applying State policy under *Erie* v. *Tompkins*) is not untrammeled in so denying comity. The Full Faith and Credit Clause "abolished,

9. It was fresh in the minds of this Court, by reason of the related questions clearly explained in *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 103-106, and *Holmberg* v. *Armbrecht*, 327 U. S. 392, 394.

in large measure, the general principle of international law by which local policy is permitted to dominate the rules of comity". *Broderick* v. *Rosner*, 294 U. S. 629, 642, 643; *Angel* v. *Bullington*, 330 U. S. 183, 188.

A simple analogy is illustrative. Illinois has a strong public policy against gambling. This is expressed by many criminal statutes against the evil, by creating *qui tam* actions for recovery of gambling losses, and similar enactments. Suppose a gambling debt created in Nevada where such actions are enforceable, and a suit to recover that debt on diversity grounds in a District Court in Illinois. Of course the District Court would not enforce the action. Why? Because it would adopt Illinois' policy against enforcement of such a debt under *Erie* v. *Tompkins*. In doing so Illinois' policy would impose a defense or substantive bar to the action.

Now suppose that Illinois' policy against gambling was *expressed in a statute barring jurisdiction of its courts* to enforce any type of a gambling debt. There is little doubt that such enactment would be within the narrow limits of local policy permitted by the Full Faith and Credit Clause. If under such circumstances the Nevada action were filed in a Federal Court in Illinois, would the Federal Court be deprived of jurisdiction, or would it again adopt Illinois' policy as a defense or substantive bar to the Nevada action? The latter must be the answer. This must be so in view of the constitutional barrier against impairment of Federal jurisdiction by State action. A statute imposing a jurisdictional bar would be nonetheless clearly expressive of Illinois' policy, as much so as a criminal law forbidding gambling, or a statute creating a *qui tam* action. No citation of authority is necessary in support of the assertion that the policy of a State is to be determined by its Constitution, its statutes, or by the decisions of its courts. What is applied, under *Erie* v.

*Tompkins* in such cases, is State policy *no matter how that policy be expressed.*

So in *Angel* v. *Bullington*, the State policy against deficiency judgments was expressed in a statute depriving courts in North Carolina of power to hear or entertain such actions. What this Court determined was that, if such North Carolina policy was permissible under the Full Faith and Credit Clause (and Bullington was foreclosed on this question by the determination of the North Carolina Supreme Court), then a Federal Court in North Carolina was bound under *Erie* v. *Tompkins* to apply North Carolina policy *as a defense or substantive bar* to such a cause of action, but not a jurisdictional bar.

3. What prompted the Court of Appeals to hold that the doctrine of *Erie* v. *Tompkins*, as expounded in *Angel* v. *Bullington* and *Woods* v. *Interstate Realty Co.*, had the effect to cause the Illinois statute to bar constitutionally conferred jurisdiction of the Federal Court?

We respectfully submit that such holding was prompted by two things: first, a failure to appreciate that the doctrine of *Erie* v. *Tompkins* is the very antithesis of constitutionally conferred judicial power under Article III; and, second, because of the use of the phrase "diversity jurisdiction" by this Court in both *Angel* v. *Bullington* and *Woods* v. *Interstate Realty Co.*, cases which involved application of the doctrine of *Erie* v. *Tompkins* where local statutes barred jurisdiction of local courts.

(a) The right of States under *Erie* v. *Tompkins*, to make or expound law, *not involving Federal questions*, is a *reserved* power, not granted by Article III. Article III is a *grant* of judicial power to the Federal government. This grant of judicial power expressly includes the right to confer jurisdiction in diversity cases. It seems fundamental that the *granted* power cannot usurp the *reserved*

power. And it seems equally fundamental that the *reserved* power cannot affect the *granted* power. We submit that nothing in *Erie* v. *Tompkins* or in any of its numerous progeny in the slightest degree attempted to cut down the clear and explicit grant of jurisdiction in diversity cases conferred by Congress in pursuance of Constitutional authority; and that such a construction of *Angel* v. *Bullington* and *Woods* v. *Interstate Realty Co.* is contrary to fundamental concepts.

(b) We respectfully assert the use of the phrase "diversity jurisdiction" in both *Angel* v. *Bullington* and *Woods* v. *Interstate Realty Co.* was unfortunate. *Both had to do with local statutes barring jurisdiction of local courts: Woods,* said, p. 538: "that for purposes of diversity jurisdiction a Federal Court is, in effect, only another court of the State.'" This paraphrased the following expression from *Guaranty Trust Company* v. *York,* 326 U. S. 99, 108: "But since a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another Court of the State, it cannot afford recovery if the right to recover is made unavailable by the State . . .". It is seen that *Woods* substituted the phrase "for purposes of diversity jurisdiction", for the language, "a Federal Court adjudicating a State-created right solely because of the diversity of citizenship of the parties", used in *York.* The phrase "diversity jurisdiction" was borrowed from *Angel,* pp. 187, 191, 192.

It is plain that the phrase "diversity jurisdiction", as thus used, is employed to differentiate those cases in which a State-created right of action is involved, from cases in which a Federal question is involved.[10] In the one *Erie* v.

10. See *Holmberg* v. *Armbrecht,* 327 U. S. 392, 394. "But in the *York* case we pointed out with almost wearisome reiteration, in reaching this result, that we were there concerned solely with State-created rights. For purposes of diversity suits a federal court is,

*Tompkins* applies. In the other it does not. Yet because of this one unfortunate phrase in both *Woods* and *Angel, cases where State statutes were involved barring jurisdiction,* anyone reading the phrase was prone to reach the conclusion that *Erie* v. *Tompkins* could cause a State statute *to bar constitutionally conferred jurisdiction of the Federal Court,* the conclusion reached below.

Therein, we submit, lie the reasons for the Court of Appeals' decisions overturning the great body of law based on fundamental concepts under Article III, that State action can in no way, directly or indirectly, impair Federal jurisdiction.

## III.

**The District Court Below Had Power Under Section 1406 (a) of Title 28 U. S. C. A. to Transfer This Case to the Federal Court in Utah.**

1. An alternative motion was made in the District Court below to transfer this case to the District Court in Utah under Section 1406 (a), 28 U. S. C. A. (R. 21, 22).

That section provides:

> "The district court of a district in which is filed a case laying venue in the wrong division or district shall * * *, if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

This alternative motion to transfer was denied below, the Court of Appeals finding that since there was no jurisdiction to entertain the suit, there was nothing before the Court to transfer (R. 50).

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in effect, 'only another court of the State'. The considerations that urge adjudication by the same law in all cases within a State when enforcing a right created by that State are hardly relevant for determining the rules which bar enforcement of an equitable right created not by a State legislature but by Congress."

Section 1406 (a) has been construed to permit transfer of a case brought in the wrong district to the proper district, even after the statute of limitations had run. *Orr v. U. S.*, 174 F. 2d 577 (C. C. A. 2, 1949). That was an admiralty action. Venue was limited to the residence of the libelant or to that in which the ship was located. The action was instituted in a Federal Court where neither of these requisites existed, and the Government raised the question in appropriate fashion.

This decision was followed by another to the same effect in *Untersinger v. U. S.*, 181 Fed. 2nd 953 (C. C. A. 2, 1950).

Both decisions held that the statute was remedial, and should have a liberal construction to prevent injustice.

2. If the District Court in Illinois has no jurisdiction because of the Illinois statute (which of course we do not concede), but other Federal District Courts do have, does Section 1406 (a) vest the Federal Court in Illinois with power to make a transfer to one having jurisdiction?

We submit the answer to this question is supplied by the decision of this Court in *Herb v. Pitcairn*, 325 U. S. 77, 392 Ill. 38. There an action based on the Federal Employers' Liability Act was instituted in a city court. The Illinois Supreme Court held that the city court had no jurisdiction of the cause of action. Illinois law provided machinery for a transfer from the city court to the Circuit Court. After the Statute of Limitations had run under the Federal Act, a motion was made for its transfer. The Illinois Supreme Court held that a suit never had been filed, since it was filed in a court lacking jurisdiction, and that the limitation period provided by Federal law had not been satisfied at the time the case was first docketed in the Circuit Court. This Court held that even though the city court lacked jurisdiction, nevertheless the statute of limitations was satisfied by the filing of the action and the bringing in of the defendant by service of process, where there

was machinery provided for transfer of the cause to a tribunal having jurisdiction to try it.

In this case Section 1406 (a) provides the machinery whereby the cause can be transferred to a court capable of hearing it. Suit was instituted, the defendant was brought in by service of process, and issue was joined. *Herb* v. *Pitcairn* is authority for its transfer to Utah. The statute of limitations provided by Utah is satisfied by the service of process and joinder of issue in the Federal Court in Illinois.

3. If we are wrong on our contention under Full Faith and Credit (which again we do not concede), nevertheless there is no question but that the District Court had power to hear and entertain this suit. If Illinois policy supplies a defense to the suit, this goes to *duty* and not the *power*, as Justice Holmes so clearly pointed out in *Fauntleroy* v. *Lum*, 210 U. S. 230, 234, 235. Under such circumstances, Illinois would be an improper venue, because of the peculiar local policy expressed by the Illinois statute. Under such circumstances, Section 1406 (a) supplies a means to transfer the case to a proper venue.

4. If we are wrong in the contentions raised by Points I and II of this brief, the result will deny to plaintiff substantial damages for the benefit of the bereaved widow and children of decedent. We realize such result does not provide a legal argument in favor of transfer. But undoubtedly thousands of deserving litigants whose actions are now pending before Federal Courts would likewise be denied recourse, if we are wrong on those contentions. And that result certainly furnishes proper motive to search for some machinery or procedure to obviate the injustice.

The construction of Section 1406 (a) as placed on it by the Second Circuit shows that it is a remedial statute to prevent such an injustice. The phraseology of the statute is not technical. Its broad intent is to permit transfer

where the suit was instituted in the wrong place. It supplies machinery whereby this and other like cases can be transferred to a proper venue "in the interest of justice."

## IV.

**The Proviso to Section 2 of the Illinois Injuries Act Contravenes Section 13 of Article IV of the Illinois Constitution of 1870.**

The Illinois Injuries Act was enacted in 1853. It always has had the title, "An Act requiring compensation for causing death by wrongful act, neglect or default." The first section created the right of action for wrongful death; and the second section provided: (a) who was entitled to bring the action; (b) for whose benefit recovery was to be had; (c) a limit on the amount of recovery; and (d) the time within which the action must be brought. (70 Ill. Anno. St., pars. 1 and 2, and historical note.)

The proviso denying jurisdiction to Illinois' courts to entertain causes of action for wrongful death created by laws of other States was first inserted by amendment to Section 2 in 1903 (Laws 1903, p. 217). The proviso then pronounced "that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside this State." This proviso was subsequently amended to its present form, which has been quoted above, in 1935. (Laws 1935, p. 916.)

Both amendatory acts, that of 1903 and that of 1935, bore the title: "An Act to amend Section 2 of 'An Act requiring compensation for causing death by wrongful act, neglect or default'."

Section 13 of Article IV of the Illinois Constitution of 1870 contains the following provision:

> "No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title.

> But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed; * * *".

The addition of the provisos of 1903 and of 1935 to the Injuries Act brought into that enactment a subject that is not embraced in its title, but which is entirely foreign to its title. An Illinois act *requiring compensation* for wrongful death can have no relation to foreign actions, since the local statute has no extra-territorial effect. An act *requiring compensation* for causing death by wrongful act in Illinois does not embrace a subject which *denies jurisdiction of Illinois courts* to entertain causes of action created by laws of sister States.

The above provision of the Illinois Constitution has been passed upon many times. The most recent decision is *Johnson* v. *Daley*, 403 Ill. 338, 342-344. There the title was: "An Act in relation to a tax on persons engaged in the business of selling cigarettes, and providing for collection of such tax and penalties for violations of the Act." This act was amended to include those who brought cigarettes into the State for consumption as being within its purview. Since this did not constitute a sale, much less a business of selling, the amendment was held void. Likewise, in *Stolze Lumber Co.* v. *Stratton*, 386 Ill. 334, 340-344, the Retailers Occupation Tax Act bore the title: "An Act in relation to a tax upon persons engaged in the business of selling tangible personal property to purchasers for use or consumption." An amendment was adopted which sought to measure the tax by the sale of property to a contractor, who, in turn, transferred to an owner. On page 341 of the opinion, the Court reviews the authorities and holds that the amendment, by bringing in a new subject—taxing a business of selling for resale or re-transfer—was not within the scope of the title and void under Section 13 of Article IV.

A thorough analysis of the reasons for and application of the single subject clause of Section 13 of Article IV may be found in *Rouse* v. *Thompson*, 228 Ill. 522, at pages 530 through 534. This case, as do those previously cited, clearly demonstrates that the decision of the Court of Appeals below was wrong.

There is a further refinement of the rule under Section 13 of Article IV. That is when a particular section of an Act is amended by an amendatory act with a title such as those of 1903 and 1935, *the amendment may not bring any new subject into the section so amended*, but can only amend the subjects which originally were embraced in that section. For example, an act amending section 2, with a title such as the amendatory acts of 1903 and 1935 bore, could change the person entitled to bring the suit for wrongful death; it could change those entitled to benefit by the recovery; it could change the permitted amount of recovery (which has twice been done); and it could change the limitation period (which has been done once). All of those subjects were originally included in section 2. But the amendatory act cannot bring a complete new subject into section 2, the deprivation of jurisdiction of Illinois' Courts to foreign actions for wrongful death. The law on this refinement of the construction of the single subject requirement is thoroughly expounded in *Dvlese* v. *Pierce*, 124 Ill. 140, 145, 146.

## Conclusion.

For the reasons outlined above in this brief in support of the Petition for Writ of Certiorari herein, we respectfully submit that the Writ should be issued by this Court.

Respectfully submitted,

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# APPENDIX.

THE UTAH WRONGFUL DEATH STATUTE; Section 104-3-11-UCA 1943;

Except as provided in Chapter 1, of Title 42,[1] when the death of a person not a minor is caused by the wrongful act or neglect of another, his heirs, or his personal representatives for the benefit of his heirs, may maintain an action for damages against the person causing the death, or if such person is employed by another person who is responsible for his conduct, then also against such other person. If such adult person has a guardian at the time of his death, only one action can be maintained for the injury to or death of such person and such action may be brought by either the personal representatives of such adult deceased person, for the benefit of his heirs, or by such guardian for the benefit of the heirs as provided in the next preceding section. In every action under this and the next preceding section[2] such damages may be given as under all the circumstances of the case may be just.

1. This Chapter contains the workmen's compensation laws of the State of Utah.

2. Section 104-3-10 UCA 1943 which gives a cause of action to parents of a minor child who has been injured or killed by the wrongful act or neglect of another.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

October Term, 1950, April Session, 1951.

No. 10337.

THE FIRST NATIONAL BANK OF CHICAGO, Executor of the Estate of JOHN LOUIS NELSON, Deceased,
*Plaintiff-Appellant,*
*vs.*
UNITED AIR LINES, INC., a Corporation,
*Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

July 5, 1951.

Before KERNER, FINNEGAN, and LINDLEY, *Circuit Judges.*

Per Curiam. This is an appeal from a summary judgment dismissing an action brought by plaintiff against defendant to recover damages for the death of plaintiff's testate, because of his wrongful death while a passenger aboard one of defendant's airliners which crashed on October 24, 1947, at Bryce Canyon, Utah. Jurisdiction is based on diversity of citizenship and amount in controversy. Plaintiff's testate prior to his death was a resident and citizen of Illinois. Defendant is a Delaware corporation whose principal office is located at Chicago, Illinois, but it is qualified to do business in the state of Utah and has registered agents available in that state for service of process upon it. The action was brought under the Utah wrongful death statute, Section 104-3-11, U.C.A.1943.

Defendant answered the complaint and moved for summary judgment on the ground that ch. 70, § 2 of the Ill. Rev. St. operated as a bar to the maintenance of the action in Illinois. That section provides: "* * * that no action shall

be brought or prosecuted in this State to recover damages for a death occurring outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place."

In answer to defendant's motion, plaintiff contended, inter alia, that the Illinois statute could not limit the jurisdiction of the federal courts, even though service of process could be had upon the defendant in Utah, and argued that to hold that it did would violate the full faith and credit clause of Art. IV, § 1 of the United States Constitution. The trial judge held the Illinois statute deprived the District Court of jurisdiction and that the full faith and credit clause of the Constitution had not been violated.

This court has already held that the provisions of the Illinois statute were binding on the federal courts in Illinois, and constituted a bar to the maintenance of an action for damages for wrongful death in an action where, as here, a right of action for such death exists under the laws of the state where the death occurred. *Trust Co. of Chicago* v. *Pennsylvania R. Co.*, 183 F. 2d 640, and *Munch* v. *United Air Lines*, 184 F. 2d 630. But in those cases no contention was made that the Illinois statute violated Art. IV, § 1 of the United States Constitution.

In this court plaintiff renews its contention and cites *Hughes* v. *Fetter*, 341 U. S. ....., decided June 4, 1951, which it says is conclusive on the question presented on this appeal. In that case appellant brought his action in a Wisconsin state court to recover for the death of his intestate in Illinois. He based his complaint on the Illinois wrongful death statute. The trial court held appellant's action was barred in Wisconsin because the Wisconsin statute created a right of action only for a death caused in that state. The Wisconsin Supreme Court affirmed, 257 Wis. 35. The United States Supreme Court, although reaffirming the principle that "full faith and credit does not automatically compel a forum state to subordinate its own statutory policy," recognized that there is a conflict of policies which requires that one be accepted and the other rejected, and held that Wisconsin's expressed statutory policy against permitting Wis-

consin courts to entertain foreign wrongful death actions was in the face of and contrary to the national policy embodied in the full faith and credit clause of the Constitution. The fact that the absolute bar to the action in the Wisconsin courts might result in the total extinguishment of the cause of action because of the practical difficulties of service of process in Illinois apparently influenced the majority to tip the scales in favor of accepting the full faith and credit policy as against the right of Wisconsin to close its courts to causes of action for wrongful death arising out of the state.

In our case no such compelling reason appears. The Illinois statute, as we have already observed, differs substantially from the Wisconsin statute in that it does not, without exception, exclude all foreign wrongful death actions but only those as to which "a right of action * * * exists under the laws of the place where such death occurred and service of process * * * may be had upon the defendant in such place." Thus, it seems clear that whereas the Wisconsin statute constituted an absolute and unconditional refusal on the part of that state to enforce in its courts the wrongful death statutes of sister states, the Illinois act recognizes the existence and enforcibility of the right of action created by such statutes and authorizes the courts of Illinois to entertain such actions, except in cases where they are capable of being prosecuted to judgment in the courts of the state which created them. Whether the Illinois statute and the policy reflected thereby—a policy which appears to be based on considerations not unlike those responsible for the application of the doctrine of *forum non conveniens* in the federal courts—offend against the Constitution's full faith and credit clause is the crucial question presented on this appeal. Its solution can not, it seems to us, be found in the disposition of a case in which the court observed that the statute held unconstitutional could not be regarded as "an application of the *forum non conveniens* doctrine" and went on to point out that the proscribed legislation might result in "a deprivation of all opportunity to enforce valid death claims created by another state,"—a result which can never obtain under the terms of the Illinois statute.

In the light of the Supreme Court's repeated declaration

that "the full faith and credit clause is not an inexorable and unqualified command" and that, consistently with its proper application, "there are limits to the extent to which the laws and policy of one state may be subordinated to those of another," *Pink* v. *A. A. A. Highway Express*, 314 U. S. 201, 210-211; *Alaska Packers Ass'n* v. *Industrial Accident Comm'n*, 294 U. S. 532, 546, 547; *Pacific Employers Ins. Co.* v. *Industrial Accident Commission*, 306 U. S. 493, 501; *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487, 498; *Williams* v. *North Carolina*, 317 U. S. 287, 302, the constitutionality of the Illinois act would seem to us to be dependent on the reasonablenss of the conditions it establishes for the maintenance, in the courts of Illinois, of an action arising under the wrongful death statute of a sister state, *i. e.*, on whether the statute is "a permissible limitation on the full faith and credit clause," *Williams* v. *North Carolina*, 317 U. S. 287, 302; *Alaska Packers Ass'n* v. *Industrial Accident Comm'n*, 294 U. S. 532, 546-547, rather than on the fact that a statute which unconditionally excludes all actions based on foreign statutes has been held to violate that clause.

While it is true, as plaintiff argues, that the Illinois statute is not expressive of a policy against wrongful death suits in general, it is clearly an expression of a public policy against permitting Illinois courts to entertain any wrongful death suit which is capable of reduction to judgment in a forum of the state under whose laws it arose. We can not believe that this policy is violative of the constitutional requirement of full faith and credit. On the contrary, it recognizes the validity and enforcibility of the wrongful death statutes of sister states, and provides for their enforcement in the courts of Illinois in the event they can not be enforced in the courts of the state which enacted them. It is hardly to be doubted that the Illinois statute, in tending to regulate and reduce the case load of the Illinois courts, tends to promote the prompt and orderly administration of justice in those courts, which is, undeniably, a matter of vital and legitimate concern to that state. Consequently, since "*Prima facie* every state is entitled to enforce in its own courts its own statutes" and "One who challenges that right, because of the force given to a conflicting statute of another state by the full faith and credit clause, assumes

the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum," *Alaska Packers Ass'n* v. *Industrial Accident Comm'n*, 294 U. S. 532, 547-548, it becomes necessary to inquire whether Utah's interest in having its statute enforced in Illinois in a case where it is capable of enforcement in Utah can be said to be superior to Illinois' interest in having its courts free to try cases arising in and under the laws of Illinois without the added burden of trying cases arising in and under the laws of a sister state and triable therein. It seems to us that it can not. Therefore, we hold that the Illinois statute involved in the instant case is permissible legislation under the full faith and credit clause and expressive of a public policy of Illinois not inconsistent with the proper application of that clause.

Plaintiff's next contention is that the 1935 amendment to the Illinois statute under consideration, which added the proviso limiting the wrongful death jurisdiction of the Illinois courts, violates the single-subject requirement of Art. IV of § 13 of the Illinois Constitution. We think this contention is without merit.

In *Michaels* v. *Hill*, 328 Ill. 11, 15-16, it was said: "All doubts or uncertainty arising from the language of the constitution or of the act must be resolved in favor of the validity of the act, and the court will assume to declare it void only in case of a clear conflict with the constitution. It is the duty of the court to so construe acts of the legislature as to uphold their constitutionality if such can reasonably be done. If their construction is doubtful the doubt is to be resolved in favor of the law. * * * To render an act or a portion thereof void as not embraced in the title it must be seen that it is incongruous with or has no proper connection with or relation to the title. If by any fair construction the provisions of such act have a necessary or proper connection with or relation to the title it is not open to this objection. * * * The word 'subject,' as used in the constitution, signifies 'the matter or thing forming the groundwork.' It may contain many parts which grow out of it and are germane to it, and which, if traced back, will lead the mind to it as the generic head. * * * It is not required that

the title of an act be so worded as to form an index to all the provisions contained therein, and mere mentioning in the title of related particulars is not a stating of a plurality of subjects."

Our statute is entitled "An Act requiring compensation for causing death by wrongful act, neglect or default"; certainly the proviso setting forth the circumstances under which an action may be maintained relates to this subject matter.

Finally we pause to consider plaintiff's contention that the court erred in not sustaining its motion to transfer the case to the District Court in Utah pursuant to § 1406(a) of the Judicial Code, 28 U.S.C. § 1406(a). This section applies only when a case has been filed in the wrong venue. *Orr* v. *United States*, 174 F. 2d 577, 580. Compare *Riley* v. *Union Pac. R. Co.*, 177 F. 2d 673, and *Trust Co. of Chicago* v. *Pennsylvania R. Co.*, 183 F. 2d 640, 646. Unfortunately here the District Court had no jurisdiction of the subject matter, hence it had no power to transfer the case to another court.

For the reasons stated, the judgment of the District Court must be affirmed. It is so ordered.